

Affirmative Action: The U.S. Experience in Comparative Perspective

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Broadly defined, *affirmative action* encompasses any measure that allocates resources – such as admission to selective universities or professional schools, jobs, promotions, public contracts, business loans, or rights to buy, sell, or use land – through a process that takes into account individual membership in underrepresented groups. Its purpose is to increase the proportion of individuals from those groups in the labor force, entrepreneurial class, or student population from which they have been excluded as a result of state-sanctioned oppression in the past or societal discrimination in the present. According to legal scholar Sean Pager, “Unlike traditional welfare policies grounded in distributional equity, affirmative action takes its moral force from a corrective justice ideal.”¹ It allocates scarce resources so as to remedy a specific type of disadvantage, one that arises from the illegitimate use of a morally irrelevant characteristic. Such measures may result from constitutional mandates, statutes, administrative regulations, court orders, or voluntary initiatives. They extend further than antidiscrimination policy strictly conceived, insofar as individuals are not required to provide evidence of discrimination to benefit from affirmative action. Their goal is to counter deeply entrenched social practices that reproduce group-structured inequality (even in the absence of intentional discrimination) by creating positive externalities beyond individual recipients.² Such measures benefit groups “with

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whose position and esteem in society the affiliated individual may be inextricably involved.”³

Affirmative action policies vary substantially across countries. Their *intended beneficiaries* may include not only ethnic, racial, or religious groups held to be economically and/or socially disadvantaged, but also aboriginal peoples, women, the disabled, or even war veterans. Other differences between policies relate to which (more or less flexible) *instruments* they use; what the *legal norms* are from which they derive; how extensive the *domain of implementation* is; and what their *ultimate goal* consists of, considering how the policies work and the justifications provided to support them. Programs also vary in how explicitly they target designated groups and the extent to which they benefit those groups. In this respect, there are at least three types of affirmative action:

Indirect affirmative action. These policies are “purposefully inclusionary” measures⁴ that appear neutral but are designed to benefit disadvantaged groups more than others. Such measures might be construed as “disparate impact” discrimination if the outcomes for the affected groups were reversed. In the case of race and ethnicity, one example is a law enacted in Texas in 1997.⁵ The law requires state universities to admit the top 10 percent of graduates from each high school regardless of their test scores. The purpose is to increase the percentage of blacks and Hispanics in the student body, which is made possible by the large number of high schools in that state from which virtually all graduates belong to one of these two minority groups. Similarly, in France, formally “color-blind” yet arguably “race-oriented” policies allocate additional financial resources to educationally and/or economically disadvantaged areas. The criteria used for assessing an area’s need – school perfor-

mance, the percentage of families with three children or more, and the unemployment rate – are correlated with ethnicity: they vary partly according to the proportion of African immigrants within the population. In these more or less conspicuous instances where the state employs a “substitution strategy,” the distinctive ethnic profile of the beneficiaries appears to be the secondary effect of a formally neutral principle of allocation. Yet that anticipated effect is at least in part the reason the principle was adopted in the first place. Such measures reflect the perceived illegitimacy or unlawfulness of policies that would address inequities among ethnic groups in a more straightforward manner.⁶

Outreach. Outreach programs are proactive policies designed to bring a more diverse range of candidates into a recruitment (or promotion) pool. In this case, group membership is explicitly taken into account, but in a limited way: it is allowed to enter the picture in order to enlarge the pool from which individuals will be selected; however, it does not factor into the selection itself.

Direct affirmative action. Sometimes labeled (not always pejoratively) “preferential treatment” in the United States⁷ and also known as “positive discrimination” in France and Britain, direct affirmative action grants an advantage to the members of designated groups in final decisions for jobs or college acceptance. More or less flexible policy instruments may be used, including compulsory quotas, tie-break rules, and aspirational goals or targets. In this case, an applicant from one of the designated groups (DGA 1) will be selected for a position for which he or she is basically qualified even if at least one applicant from a non-designated group is deemed more qualified. If another applicant from a designated group (DGA 2) had the same qualifica-

tions as the applicant from the non-designated group, he or she would have been selected instead of DGA 1.⁸ In other words, group membership is the key factor that triggers the outcome. DGA 1 obtains the position only because he or she is identified as a member of a designated group. Direct affirmative action, the main focus of current political and legal controversies and the topic of this essay, can thus be criticized for conflicting with two esteemed principles of the different societies under consideration: the meritocratic principle, according to which the most qualified applicant should always be selected, and the principle of “blindness” to characteristics such as race, gender, or caste.

Contested as it is today, affirmative action originally emerged as a strategy for conflict management in deeply divided societies. The important exceptions are Brazil⁹ and India; in the latter, “reservations” for lower caste members in government office and higher education and the extension of benefits to a broader group of recipients have, in fact, triggered some violent resistance by urban upper caste youth in northern states.¹⁰ In most cases, however, countries that believed themselves to be on the brink of civil war, or that had experienced at least some serious unrest, set up affirmative action policies to alleviate an empirically substantiated risk of mass violence. Affirmative action, then, has been understood in part as a last-resort device meant to deal with or prevent a major crisis in which the preservation of the social compact was or would have been at stake. As Justice Albie Sachs of South Africa’s Constitutional Court explains, countries that introduce affirmative action “do so not to meet widely proclaimed human rights standards but, sadly, because the social and economic costs of change are

outweighed by the social and economic costs of policing the status quo. Put bluntly, affirmative action has frequently come about as a rushed and forced response to what have been called race riots.”¹¹

The United States is a case in point. Sociologist John David Skrentny has shown that direct affirmative action programs were the somewhat paradoxical outcome of a reversal in law and policy that took place in a remarkably short time frame: the second half of the 1960s.¹² Indeed, not only did Congress fail to provide such programs with a constitutional foundation, in contrast with the pattern observed in India, Malaysia, and South Africa; it also had enacted a statute, the 1964 Civil Rights Act, that seemed to preclude their coming into existence. The Civil Rights Act prohibited discrimination on the basis of race, color, religion, national origin, or sex by private employers with fifteen or more employees; federal, state, and local governments; and educational institutions, employment agencies, and labor unions. Specifically, Title VII of the Act declared it “an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge *any individual* or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of such individual’s race, color, religion, sex or national origin.*”¹³ Thus, even though the motivating force behind the bill certainly was to end the discrimination suffered by blacks, whites were also protected from race-based discrimination in employment. Furthermore, section 703 (j) of Title VII explicitly stated: “Nothing contained in this subchapter shall be interpreted to require any employer . . . to grant preferential treatment to any individual . . . because of the race . . . of such individual . . . on account of an imbalance.” Yet the first (direct)

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affirmative action programs were implemented only a few years later.

The factor most directly accounting for this dramatic policy innovation was the *bureaucratic rationalization* of antidiscrimination law enforcement by the Equal Employment Opportunity Commission (EEOC).¹⁴ This development, in turn, was made possible by a highly unstable political atmosphere. Between 1964 and 1968, an unprecedented wave of race riots afflicted American cities, resulting in several hundred deaths. Alarmed, the federal government responded to black leader A. Philip Randolph's warning that "the Negro ghettos in every city throughout the nation [were] areas of tension and socio-racial dynamite, near the brink of similar explosions of violence."¹⁵ The problem of unemployment among young urban blacks – understood to be the underlying cause of that violence – seemed compelling enough to justify radical measures that had been dismissed a few years earlier. The National Advisory Commission on Civil Disorders (also known as the Kerner Commission), which President Johnson had tasked with investigating the causes of the riots, mentioned neither racial quotas nor more flexible goals. Yet although the means for implementation were left unspecified in the Commission's prescriptions, the severity of the crisis and the breadth of the commitment needed to prevent further riots were clear.

The causal relationship between racial violence and the introduction of affirmative action programs was most immediately perceptible in the field of law enforcement. Previously, blacks and Hispanics were nearly absent from the police forces in predominately black and Hispanic urban areas. Therefore, one of the main recommendations submitted by the Kerner Commission was to "increase substantially the recruitment of

Negroes in the Army National Guard." That blacks made up only 1.15 percent of National Guard members in August 1967 was viewed as a "deficiency [to] be corrected as soon as possible."¹⁶ From that point on, some form of affirmative action beyond outreach was made part of the recruitment agenda.

In the United States, the role of inter-racial strife in creating a new decision-making environment that led to the introduction of direct affirmative action was made particularly visible by the existence of a contradictory prescription in a statute enacted only a few years earlier. Yet a similar dynamic has been operating in other countries. In Malaysia, the May 1969 riots pitting Chinese against Malay residents of Kuala Lumpur resulted in a death toll of several hundred persons (most of them Chinese). The violence prompted not only a markedly authoritarian turn in the Malaysian political system but also the introduction, in 1971, of a New Economic Policy, which extended affirmative action from the public to the private sector. The government believed the key to restoring minimal intercommunal harmony was to reduce the gap between the politically dominant Malays and the economically successful Chinese.

Similarly, in Northern Ireland, the need to defuse violent conflict sustained by persistent religious discrimination has led to a stronger affirmative action regime. In accordance with the Fair Employment Act of 1989, all public authorities and private sector employers with more than ten employees are required to register with the Equality Commission, periodically submit reviews on the religious composition of their workforce, and consider implementing an affirmative action program whenever discrepancies are substantial.¹⁷ By contrast, in mainland United Kingdom, "positive ac-

tion” programs are, theoretically, non-compulsory for private employers.¹⁸ In what is still the only example of a mandatory quota in U.K. law, section 46 of the Police (Northern Ireland) Act of 2000 goes so far as to require that equal numbers of Catholics and non-Catholics be appointed to the police service from a pool of qualified applicants.

Even in France, where, according to the prevailing legal doctrine, “color blindness” has been constitutionalized (in contrast to the United States¹⁹), the most blatant (yet unacknowledged) violation of that rule occurred during the Algerian War of Independence. The French government then launched an ultimately unsuccessful attempt to legitimize the colonial order by co-opting its Algerian subjects in greater numbers. Between 1958 and 1960, a series of affirmative action measures – including straight quotas – was enacted through executive orders (*ordonnances*) to promote the integration of Algerian-born French Muslims into selected components of the civil service and public administration.²⁰ In March 2003, to ensure that a similar process of decolonization through armed conflict would not take place in New Caledonia, the French Constitution was amended to authorize overseas territories to implement preferential measures “in favor of [their] population in . . . employment, in the award of licences required for certain occupations, or regarding the protection of land assets.”²¹ The causal link between violence that threatens to disrupt the existing political order and the introduction of affirmative action programs – a link observed in otherwise strikingly different cultural and legal environments – is thus hard to deny.

Another structural feature of affirmative action regimes is that they are resilient and tend to expand over time. In

theory, the goal of special treatment for members of disadvantaged groups is to make the need for it disappear as quickly as possible; in reality, the programs are difficult to dislodge. Although affirmative action has generally been conceived and justified as a temporary measure,²² it tends to become permanent in democratic societies, where benefits, once given, cannot be easily withdrawn. In many cases, affirmative action programs have even expanded in scope, either embracing additional groups, encompassing wider realms for the same groups, or both.

In the United States, for instance, affirmative action almost immediately spread outward from native-born blacks to other groups with an arguably lesser need for remedial treatment, including women²³ and other ethno-racial minorities – Hispanics and Asians in particular, whose numbers increased dramatically as a result of immigration reform. The consequences of extending the policy’s range received little thought. It was the exceptional experience of blacks – and the impulse to remedy the injustice inflicted on them – that allowed affirmative action to be (imperfectly) legitimized in the first place “and subsequently . . . picked up by other groups who would not have been able to make the original claim.”²⁴

Yet even if it had been “politically feasible and socially desirable” to cast affirmative action as a corrective measure predicated on the *sui generis* African American experience, a measure exclusively designed to undo the harm suffered by members of that particular group, the Supreme Court held that courts do not have the capacity to determine whom should receive preferential treatment. As Justice Lewis Powell explained, the unavoidable comparative assessment of the degrees of victimization experienced

by all groups with potential claims for affirmative action benefits involves a “kind of variable sociological and political analysis . . . [that] does not lie within judicial competence.”²⁵ Instead, the Court has conditioned the use of race-based affirmative action on enhancing the diversity of viewpoints represented in higher education,²⁶ a safer argument, but one that does not prevent the policy from being extended to an ever-broader set of groups; indeed, quite the contrary has happened.

Moreover, in addition to this first kind of expansion, while affirmative action programs emerged as a requirement imposed by the federal government on public contractors, they are now in play at universities, state and local governments, private firms, and regulatory agencies responsible for granting licenses. In some domains the Supreme Court made the policy’s conditions of validity more restrictive over time²⁷; in others – such as higher education – it confirmed the constitutionality of affirmative action provided that the programs remain suitably informal.²⁸

Similar to trends in the United States, in India quotas in university admissions and government employment were originally instituted to help the historically oppressed Scheduled Castes (SCs) – the “Untouchables” – and Scheduled Tribes (STs),²⁹ but over time were extended to the somewhat better-off lower castes. As of 1980, 52 percent of the Indian population was eligible. As in Malaysia and South Africa, the national affirmative action regime now offers benefits to ascriptive (non-gender) groups that make up a *majority* of the population, despite a large-scale resistance to that extension that persisted over several decades.

Affirmative action began in India under British colonial rule as a set of programs designed for the advancement of the Un-

touchables, first in the field of education as early as 1892, then in civil service and political office. After the country gained independence, the 1950 Constitution of India mandated that a proportional number of seats be reserved for members of SCs in federal and state legislative assemblies. The Constitution also enabled states to set aside a population-linked share of government jobs and places in educational institutions for those groups’ benefit. Furthermore, it authorized the potential extension of quotas to groups other than SCs and STs in Article 15 (4), which explicitly allows the states to “mak[e] any special provision for the advancement of any socially and educationally backward classes of citizens.” Yet the ratios used, and even the definition of the relevant groups – in the case of the so-called Other Backward Classes (OBCs) – were left for state governments to determine. Caste was by no means preordained as a defining feature.

Aside from the case of SCs and STs, both the Constituent Assembly and successive post-independence parliaments expected criteria of “backwardness” to be defined in economic terms; for forty years, they dismissed the recommendations of various Backward Classes commissions that caste should determine affirmative action benefits.³⁰ One such commission, the Mandal Commission, proposed in 1978 to add a national quota of 27 percent in government jobs for OBCs. This recommendation was in addition to the existing (proportional) quota of 22.5 percent: 15 percent for SCs and 7.5 percent for STs. Although the OBCs were granted affirmative action benefits in some individual states and provinces, it was not until the beginning of the 1990s that the proposal was adopted and received the imprimatur of India’s Supreme Court.³¹

In addition to extending benefits to other groups, India's quota system has expanded within the public domain. Places were reserved for SCs and STs first in admission to state colleges and professional schools, then in appointments to the state and central administrative services, and, eventually, in any number of positions in the public sector. More recently, as economic liberalization – under the direction of the International Monetary Fund and the World Bank's Structural Adjustment Programs – and the privatization of government sector jobs have drastically reduced the reach of affirmative action, some have considered bringing the private sector under the purview of the reservation policy.³²

As the historical developments of the U.S. and Indian affirmative action regimes suggest, regardless of whether the policy is explicitly authorized in a country's Constitution, affirmative action tends to expand to other groups and domains. When, initially, the intended beneficiaries are stigmatized numerical minorities, the number of recipients and/or policy areas covered increases over time. That a similar expansion takes place in countries where affirmative action has been constitutionalized in more specific terms, and where the policy benefits politically dominant yet economically disadvantaged *majority* groups, is therefore hardly surprising.

In most countries where the beneficiaries of affirmative action (women excepted) are or originally were minority groups, the legal validity of targeted programs depends on whether the programs meet a set of formal requirements. Arguably the most important requirement is that the process by which scarce resources are allocated should not be determined *exclusively* by group member-

ship. Thus, in the 1963 *Balaji v. State of Mysore* decision, while the Indian Supreme Court did not object to the use of caste as a criterion for the identification of "backwardness," it held that caste could not be the only criterion considered. Similarly, the 1978 U.S. Supreme Court decision *California v. Bakke* allowed university admissions to take race into account as long as it was treated as just one among many potential diversity-enhancing features to be weighed against all the others.³³ In the same vein, the European Court of Justice has opposed appointment or promotion schemes under which women candidates would be automatically preferred to men³⁴; the court approved, however, "a tie-break rule giving preference to women where women and men are equally qualified, as long as an equally qualified male had the opportunity to establish that a reason specific to his case should tilt the balance in his favour."³⁵

These formal constraints are much less stringent in countries where law discourages resistance to affirmative action as a matter of principle. In Malaysia and South Africa, where the disadvantaged groups that benefit from the policy are numerical majorities,³⁶ affirmative action programs, unsurprisingly, are both more extensive and more explicit. Thus, Malaysia's 1957 Constitution confers privileges to *bumiputeras* (ethnic Malays) with a view to uplifting their economic position and thereby eradicating the remnants of the old colonial order in a particularly broad range of settings, including the award of business licenses and the distribution of land ownership.³⁷ Moreover, in the aftermath of the 1969 riots, the 1948 Sedition Act was revised to make it illegal to question the existence of these privileges.³⁸ Advocating for the suppression of affirmative action thus constitutes a criminal offense pun-

ishable by up to three years in jail³⁹ – a provision without equivalent in any other country.

In South Africa, the 1996 Constitution was also designed to forestall any argument over the permissibility of affirmative action for members of disadvantaged groups, with a view to avoiding legal controversies of the kind that were then unfolding in the United States. Section 9 (2) states: “[T]o promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.”⁴⁰ Section 9 (3) indicates that “the state may not *unfairly* discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.”⁴¹ Section 9 (5) makes clear that, in some cases, discrimination may be considered “fair”; and the 1998 Employment Equity Act confirms that “affirmative action” measures by “designated employers” vis-à-vis members of “designated groups” fall under this rubric.⁴²

In Malaysia, in the aftermath of the events that made reducing group inequality appear more urgent than ever, the constitutional status of affirmative action provided the central government with an already familiar set of programs, whose scope was then enlarged substantially for the sake of political stability. Hence the New Economic Policy entailed, inter alia, the acquisition of shares in private corporations on behalf of *bumiputeras* by public authorities. The official goal of this policy was to promote “the restructuring of society so as to eliminate the identification of race with economic function”⁴³ by 1990. The project of bringing about a radical, large-scale

social transformation, which arguably underlies affirmative action even in liberal democracies,⁴⁴ was thus made strikingly – and unusually – explicit.

Similarly, the Employment Equity Act in South Africa explicitly states that affirmative action measures may “include preferential treatment.”⁴⁵ Most distinctively, under sections 20 (3) and 20 (5) of the Act, a designated group member’s lack of the necessary qualifications is not a sufficient reason for hiring a non-designated group member instead: the employer “may not unfairly discriminate against a person solely on the grounds of that person’s lack of relevant experience.” Rather, the only legitimate matter of concern is the applicant’s “capacity to acquire, within a reasonable time, the ability to do the job.” By squarely rejecting the very criterion of merit as conventionally defined by the level of qualification, South African law thus embraces a conception of affirmative action reflecting the comparatively high degree of legitimacy that the policy enjoys in that country. This fact is explained largely by the clear causal link between current group inequality and the recently dismantled and morally discredited apartheid regime. In this case, affirmative action most visibly partakes of a simultaneously corrective and prospective strategy geared toward the deracialization of power and the structural transformation of the polity in an egalitarian direction. This approach is in line with the reference to the “crea[tion] of a new order” in the Preamble of the 1993 Interim Constitution⁴⁶ and the Postamble’s definition of this document’s ultimate purpose as being no less than the “reconstruction of society.”⁴⁷

How do these different affirmative action regimes define the social outcome, the attainment of which would

justify the termination of the policy? Two cases might be usefully distinguished. In some countries – such as Malaysia, for instance – the proportionality criterion provides an obvious and relatively uncontroversial “focal point.”⁴⁸ In others – such as the United States, by contrast – proportional representation is emphatically rejected as a distributive principle, even though it arguably operates covertly at the policy-making level by defining the benchmark against which “discrepancies” and “deficiencies” will be identified and compensated for. Yet at the end of the day, one may well argue that the ultimate goal of affirmative action will be reached only *when it will not occur to anyone* to verify the percentage of black

students or employees at a given university or enterprise. If race should eventually become – according to the color-blind ideal – as negligible a physical characteristic as eye color,⁴⁹ it would not be a matter of simply *knowing* that there is no correlation between that trait and the positions held by individuals in the economic and occupational hierarchy. Rather, societies must reach a point at which no one would even *think* of undertaking an empirical investigation designed to find out. In this respect, at least in countries where the ideal of societal integration is the strongest, an irreducible paradox of affirmative action policy is that it openly aims to eliminate the conditions that justify its implementation.

ENDNOTES

- ¹ Sean Pager, “Antisubordination of Whom? What India’s Answer Tells Us about the Meaning of Equality in Affirmative Action,” *UC Davis Law Review* 41 (1) (2007): 336.
- ² See Paul Brest and Miranda Oshige, “Affirmative Action for Whom?” *Stanford Law Review* 47 (1995): 855–900. The authors describe benefits of affirmative action in eliminating stereotypes and creating minority role models.
- ³ *Beauharnais v. Illinois*, 343 U.S. 250 (1952), 263.
- ⁴ Christopher McCrudden, “Rethinking Positive Action,” *Industrial Law Journal* 15 (1) (1986): 223.
- ⁵ The text is available at <http://www.utexas.edu/student/admissions/research/HB588Law.html>.
- ⁶ See Jon Elster, *Local Justice: How Institutions Allocate Goods and Necessary Burdens* (Cambridge: Cambridge University Press, 1992), 116–120.
- ⁷ See Marshall Cohen, Thomas Nagel, and Thomas Scanlon, eds., *Equality and Preferential Treatment* (Princeton, N.J.: Princeton University Press, 1977).
- ⁸ See Thomas Nagel, “Equal Treatment and Compensatory Discrimination,” *Philosophy and Public Affairs* 2 (4) (1973): 348.
- ⁹ See Mala Htun, “From Racial Democracy to Affirmative Action: Changing State Policy on Race in Brazil,” *Latin American Research Review* 39 (1) (2004): 60–89.
- ¹⁰ See Christophe Jaffrelot, “The Impact of Affirmative Action in India: More Political than Socioeconomic,” *India Review* 5 (2) (2006): 184–185.
- ¹¹ Albie Sachs, “Foreword,” in *Race and Inequality: World Perspectives on Affirmative Action*, ed. Elaine Kennedy-Dubourdieu (Aldershot, U.K.: Ashgate, 2006), ix.
- ¹² See John David Skrentny, *The Ironies of Affirmative Action: Politics, Culture, and Justice in America* (Chicago: University of Chicago Press, 1996), 67–110.

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- ¹³ Civil Rights Act of 1964, Title VII, section 703 (a), <http://www.eeoc.gov/policy/vii.html>; emphasis added.
- ¹⁴ See Skrentny, *The Ironies of Affirmative Action*, 9, 14, 231.
- ¹⁵ Quoted in John David Skrentny, "Policy-Elite Perceptions and Social Movement Success: Understanding Variations in Group Inclusion in Affirmative Action," *American Journal of Sociology* 111 (6) (2006): 77.
- ¹⁶ "Letter from the Kerner Commission to President Johnson," in *Civil Rights During the Johnson Administration, 1963 – 1969*, ed. Steven F. Lawson (Frederick, Md.: University Publications of America, 1984); on microfilm, part 1, reel 10, frame 1237.
- ¹⁷ Fair Employment (Northern Ireland) Act of 1989, section 31, http://www.opsi.gov.uk/acts/acts1989/Ukpga_19890032_en_1.
- ¹⁸ See Steven Teles, "Positive Action or Affirmative Action? The Persistence of Britain's Antidiscrimination Regime," in *Color Lines: Affirmative Action, Immigration, and Civil Rights Options in America*, ed. John David Skrentny (Chicago: University of Chicago Press, 2001), 241 – 269.
- ¹⁹ Article 1 of the French Constitution of 1958 states: "France . . . ensures the equality of all citizens before the law, *without any distinction of origin, race, or religion*," <http://www.legifrance.gouv.fr/html/constitution/constitution2.htm>; emphasis added. In the United States, the Equal Protection Clause of the Constitution's Fourteenth Amendment, according to which "no state shall deny to any person within its jurisdiction the equal protection of the laws," was not originally intended to incorporate a general requirement for state authorities to abstain from race-based classifications. The legal issue of whether one ought to infer a *rule of color blindness* from the constitutionally grounded *principle of equality* was deliberately left open for the courts to decide on a case-by-case basis; see Alexander Bickel, "The Original Understanding and the Segregation Decision," *Harvard Law Review* 69 (1) (1955): 1 – 65.
- ²⁰ See Gwénaële Calvès, "Affirmative Action in French Law," *Revue Tocqueville/The Tocqueville Review* XIX (2) (1998): 172 – 173.
- ²¹ See Constitution of France, article 74, section (*alinéa*) 8.
- ²² For a U.S. example, see the Supreme Court decision *United Steelworkers v. Weber*, 443 U.S. 193 (1979), 208. In India, while the original reservations specified in the Constitution of 1950 were set to expire ten years later, they were extended by amendment for additional ten-year periods up to this day. In Malaysia, preferences for Malays enshrined in the 1957 Constitution were intended to remain in place for a period of fifteen years and be repealed in 1972; they were not.
- ²³ In 1967, Executive Order 11375 expanded the coverage of the 1965 Executive Order 11246 on affirmative action to include women; see Executive Order 11375, 32 Fed. Reg. 14303 (1967), <http://www.dotcr.ost.dot.gov/documents/ycr/eo11375.htm>.
- ²⁴ Teles, "Positive Action or Affirmative Action?" 258. See also John David Skrentny, *The Minority Rights Revolution* (Cambridge, Mass.: Harvard University Press, 2002).
- ²⁵ *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), 297.
- ²⁶ *Grutter v. Bollinger*, 539 U.S. 306 (2003).
- ²⁷ "Minority set-asides" are a case in point. See *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 220 (1995). Beyond the domain of public contracting, only in a small number of states (California, Washington, Michigan, and Nebraska) did popular initiative referenda lead to the elimination of affirmative action across the entire public sector since the mid-1990s.
- ²⁸ See Daniel Sabbagh, "Judicial Uses of Subterfuge: Affirmative Action Reconsidered," *Political Science Quarterly* 18 (3) (2003): 411 – 436.

- ²⁹ “Scheduled Tribes” are other disadvantaged groups defined by their aboriginal status; religious, linguistic, and cultural specificities; and geographic isolation.
- ³⁰ See Jaffrelot, “The Impact of Affirmative Action in India,” 177–179.
- ³¹ *Indra Sawhney v. Union of India*, All Indian Reporter 1993 S.C. 477 (India). The OBCs were granted a quota that is half the size of what it would be if directly based on their proportion in the Indian population. In an earlier decision, *Balaji v. State of Mysore*, All India Reporter 1963 S.C. 649, the Supreme Court had capped at 50 percent the percentage of goods to be distributed through reservations by any single decisional unit. Thus, the 3,743 castes identified in the Mandal report as making up the OBCs for all practical purposes were to receive only what was left of the 50 percent available for reservation after the SC and ST proportional quotas had been taken into account. In this respect, and in sharp contrast with the U.S. affirmative action regime – in which policy-makers and judges alike have always avoided establishing a hierarchy of needs among recipients – members of the groups generally considered as the most disadvantaged receive special treatment in relation to other beneficiaries.
- ³² See, for example, Prashant Roy and Mohsin Alam, “Corporate Social Responsibility and Affirmative Action Programs: An Indian Perspective,” *Revue de l’organisation responsable* 3 (2) (2008): 49–60.
- ³³ *Regents of the University of California v. Bakke*, 315–318.
- ³⁴ *Kalanke v. Freie Hansestadt Bremen*, C-450/93 (1995).
- ³⁵ *M. H. Marshall v. Southampton and South-West Hampshire Area Health Authority*, C-271/91 (1993).
- ³⁶ In Malaysia, the ethnic Malays and other indigenous groups now make up 65 percent of the country’s estimated population of 27.5 million, while 26 percent of the population is Chinese and 8 percent Indian; <http://www.state.gov/r/pa/ei/bgn/2777.htm>. In post-apartheid South Africa, according to figures from 2007, “blacks” (that is, “Africans,” “Coloureds,” and “Indians”) made up 91 percent of the population, estimated to be 47.9 million; <http://www.southafrica.info/about/people/population.htm>.
- ³⁷ See Constitution of Malaysia, articles 89 and 153 (2); <http://confinder.richmond.edu/admin/docs/malaysia.pdf>.
- ³⁸ Sedition Act of 1948 (Act 15), section 3 (1) (f), <http://www.agc.gov.my/Akta/Vol.%201/Act%2015.pdf>.
- ³⁹ *Ibid.*, section 4 (1) (d).
- ⁴⁰ Constitution of the Republic of South Africa, Act No. 108 of 1996, chapter 2, section 9 (2), <http://www.info.gov.za/documents/constitution/1996/index.htm>.
- ⁴¹ *Ibid.*, section 9 (3); emphasis added.
- ⁴² Employment Equity Act, No. 55 of 1998, section 6 (2), http://www.workinfo.com/Free/Sub_for_legres/data/equity/Act551998.htm.
- ⁴³ Website of the Economic Planning Unit, Prime Minister’s Department (Malaysia), Introduction, http://www.epu.gov.my/c/document_library/get_file?p_l_id=10370&folderId=31146&name=DLEF-2501.pdf.
- ⁴⁴ On the U.S. case, see Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven, Conn.: Yale University Press, 1996).
- ⁴⁵ Employment Equity Act, No. 55 of 1998, section 15 (3). In the same section, “quotas” are excluded, however. In this respect, the case of South Africa stands as an exception to the otherwise observable pattern connecting the constitutionally sanctioned nature of affirmative action with the use of this rigid instrument (as in Malaysia and India) and the absence of an explicit constitutional authorization for the policy with the predominance of supposedly flexible goals (as in Canada and the United States).

- Affirmative
Action in
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- ⁴⁶ Constitution of the Republic of South Africa, Act 200 of 1993, <http://www.info.gov.za/documents/constitution/93cons.htm>.
- ⁴⁷ Ibid., “National Unity and Reconciliation.”
- ⁴⁸ Thomas Schelling, *A Strategy of Conflict* (Cambridge, Mass. : Harvard University Press, 1960), 57.
- ⁴⁹ See, for example, Richard Wasserstrom, *Philosophy and Social Issues : Five Studies* (Notre Dame, Ind. : University of Notre Dame Press, 1980), 15.